

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 327 OF 2021

(Arising from Land Case No.107 of 2013)

**MTORO JUMANNE KISINA (Administrator
of the Estates of the Late**

JALALA JUMANNE KISINA) APPLICANT

VERSUS

LILA JAFFER ROBERT 1ST RESPONDENT

RAMLA FATMA LILA 2ND RESPONDENT

MWANTUM DJUNAID KONZANGA 3RD RESPONDENT

BIBIE LILLA 4TH RESPONDENT

NAINABY LILLA 5TH RESPONDENT

SADIKI MAINE 6TH RESPONDENT

PETER PETER JUNIOR 7TH RESPONDENT

ABDALLAH MAKATTA t/a SENSITIVE

AUCTION MART AND COURT BROKERS 8TH RESPONDENT

RULING

Date of last order: 06.08.2021

Date of Ruling: 10.08.2021

A.Z. MGEYEKWA

This is an application brought under the certificate of urgency. The application is brought under section 95 of the Civil procedure Code, 1966 and Order XXI Rule 24 (1) and (2) of the Civil procedure Code, Cap.33

[R.E 2019]. The Order sought is for an interim stay of execution in the sense of lifting the attachment order dated 8th June, 2021 of Plot No. 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 44 Blok B Sanzale in Bagamoyo District pending hearing of this application.

The applicant further urged this court to stay of execution of Decree of this court in Civil Case No. 107 of 2021 ordering attachment and eviction and demolition of Plot No. 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 44 Blok B Sanzale in Bagamoyo District pending the hearing of this application. The application is supported by an affidavit deponed by Mtoro Jummanne Kisina (Administrator of the Estates of the Late JALALA JUMANNE KISINA), the applicant. The application has encountered formidable opposition from the 1st, 2nd, 3rd, 4th, and 8th respondents and the 1st 2nd 3rd, and 4th respondents. The 8th respondent opposed the application by filing a counter affidavit deponed Abdallah Makatta, the 8th respondent.

When the matter was called for hearing on 03rd August, 2021 the applicant enjoyed the legal service of Mr. Mapembe, learned counsel whereas the 1st, 2nd 3rd, and 4th respondents were represented by Mr. Charles Shipande and the 8th respondent had the legal service of Mr. Nyamuko Makatta, learned counsel.

Mr. Mapembe was the first one to kick the ball rolling. He stated that the application is referred under Order XXI Rule 24 (1) (2) of the Civil Procedure Code Cap.33 [R.E 2019]. The learned counsel for the applicant urged this court to adopt the counter affidavit and form part of his submission. He prayed for this court to stay execution of the Decree of this court in Civil Case No.107 of 2013 which ordered eviction, demolition of plot No. 26 -44, Block D Sanzale in Bagamoyo District pending the determination of the application for objection proceedings in Misc. Application No. 326 of 2021. The learned counsel for the applicant state that the 1st, 2nd 3rd, 4th, and 5th respondents sued the 6th and 7th respondents claiming that they are the lawful owners of the suit plots No. 26-44, Block D located at Sanzale area at Bagamoyo District whereas the matter was decided in favour of the 1st to 5th respondents. He went on to state that the said respondents proceeded to lodge an Execution Application No. 32 of 2020 which is the subject matter of this application.

Mr. Mapembe went on to state that this court has the power to allow an order of stay of execution is discretionary and the same be exercised in accordance with common sense and justice. He further stated that the Court of Appeal listed several factors to be considered in the application for stay of execution. To buttress his position, he cited the case of

Tanzania Electric Supply Company Ltd (TANESCO) v Independent Power Tanzania Limited (IPTL) and 2 other, 2000 TLR 324 – 328.

He continued to state that the factors to be considered are as follows: whether there is a *prima facie* case, triable issue. He referred this court to paragraphs 4, 5, 6, 7, 10, 12, 13, 14 (i) (b) (c), and (d) of his affidavit. he went on to state that the applicant has demonstrated that he was not a party in the Land Case No. 107 of 2013 nor the Application for Execution No. 32 of 2020. He added that the applicant as an administrator of the estate of Jalala Kisina has a right to sue to protect the estate of the deceased since the same is sought to be attached.

Mr. Mapembe did not end there he submitted that there are issues to be looked at by this court; whether the applicant was a party to the Civil Case o. 107 of 2013 and Execution No. 32 of 2020, whether the applicant as an administrator of the late Jalala was in possession or had an interest in the landed properties to be attached. Mr. Mapembe went on to state that another issue for determination is whether the refusal is likely to cause substantial and irreparable injury to the applicant. He stated that in the application for execution the 1st to the 5th respondents prayed to evicted the applicant and demolish the disputed property. He stated that

in case this application will not be granted the applicant will suffer loss and the intended objection for proceedings will be nugatory.

He mentioned another factor of balance of convenience. He stated that the landed property is put in jeopardy. Insisting he state that the applicant will suffer more than the respondents. He claimed that the application was failed without due delay, it was filed on 06th July, 2021 after he became aware that the execution was ongoing and the same does not intend to delay the process of execution. To support his submission he referred this court to paragraph 2 of the applicant's affidavit.

On the strength of the above submission, he urged this court to grant the applicant's application for stay of execution pending the determination of Application No. 326 of 2021.

Opposing the application, Mr. Shipande urged for this court to adopt the counter affidavit to form part of his submission. He argued that Land Case No. 107 of 2013 was lodged by the respondents against the 6th and 7th respondents before this court and this ruled out that the 6th and 7th defendants were trespasser Plot No. 26 -44 located in Block B situated at Sanzale, Bagamoyo District, Coast Region. The learned counsel for the 1st – 5th respondent Advocate went on to state that the respondent acquired

the plots through the inheritance of their late father Beno Meno Lila. He went on to state that the respondent initiated the procedure to acquire title deeds of the disputed plots and the certificate of occupancy in regard to all plots were issued to the respondents.

It was Mr. the learned counsel for the appellant submitted that the applicant claims that the disputed plot is situated in Magomeni, B contrary to an eviction order, he went on to state that the warrant of attachment through Execution No. 32 of 2020 was to attach Plots 24 – 44 located at Sanzale Bagamoyo contrary to what is stipulated under paragraph 3 of the affidavit. Mr. Shipande strongly contended that the court has established a position that to grant a stay of execution three conditions concurrently to be fulfilled. Fortifying his position he referred this court to the case of **Hatibu Omari v Behrix Kuabaza**, Civil Application No. 35/17 of 2018.

He added that the Court of Appeal of Tanzania has outlined three principles; on substantial loss, Mr. Shipande argued that the applicant has nothing to lose since he has not incurred any loss since the plot he is claiming for is situated in Magomeni contrary to the eviction order where he is applying for the execution of a different property.

Mr. Shipande continued to argue that the second condition, the application be made without unreasonable delay. He contended that Land Case No. 107 of 2013 was delivered in 2016 and after 5 years the applicant brought the instant application seeking to stay the execution No.32 of 2020. He valiantly contended that the application is a restriction the applicant from enjoying the fruit of his judgment.

Submitting on the last principle, Mr. Shipande argued that the security is not stated. He contended that the value of the property be attached. To buttress his position he referred this court to Civil Case No. 35 /17 of 2018 that the application was dismissed for failure to give security for the due performance.

Cementing his submission, Mr. Shipande complained that the late Jalala had an interest on plots 24 - 44, the applicant had no interest since the respondents are the one who owns the suit properties and they possess certificates of occupancy. He added that as to why the applicant was not a party to Land Case No.107 of 2013, there was no any cause of action against the applicant. Insisting he claimed that the applicant will not suffer irreparable loss since he has failed how he will suffer irreparable loss since he is not the owner of the disputed land.

On the strength of the above submission, Mr. Shipande stressed that the application has no legal eyes to see and no legs to stand. He urged this court to dismiss the application with costs.

On his side, Mr. Makatta, learned counsel for the 8th respondent urged for this court to adopt the counter affidavit of the 8th respondent and form part of his submission. He claimed that the 8th respondent was executing what he was ordered to execute, to attach and evict the defendants and whoever who was in the Plots No. 24 – 44 located at Sanzale Bagamoyo District as ordered in Execution No, 32 of 2020. He forcefully argued that the 8th respondent attached the Plots which are quite different from what is alleged by the applicant. Fortifying his submission he referred this court to paragraph 3 of the affidavit that the applicant is praying for a stay of execution in regard to Plots situated in Magomeni thus the ground that he will suffer loss while the attached plot is different and he did not justify his ownership. Insisting, he stated that the 8th respondent has the right to perform his work as per court order.

In conclusion, Mr. Makatta urged this court to dismiss the application for not complying with the principles stipulate din the cited case of **Hatibu** (supra).

In his brief rejoinder, the applicant's Advocate reiterated his submission in chief. He argued that in accordance with paragraph 11 of the affidavit the applicant's property is located at Sanzale Bagamoyo and the executor found himself in Magomeni Bagamoyo. He added that whether the plots are located in Bagamoyo Magomeni or Sanzale is a triable issue, he urged this court to visit locus in quo. He valiantly argued that the applicant is not praying delay tactics instead he intended to challenge the illegality or lawfulness of the execution process.

Concerning the issue of unreasonable delay, the applicant's Advocate argued that the applicant was informed in June, 2021 by the 6th respondent that his property is subjected to attachment thus he was not aware of Land Case No. 107 of 2013. On the issue of security, Mr. Mapembe argued that Order XXI Rule 24 (1) and (2) of the Civil Procedure Code Cap.33 does not state that the applicant has to furnish security.

He distinguished the cited case of **Hatibu** (supra) from the instant case. He argued that the laws applicable in the Court of Appeal of Tanzania and subordinate courts are different. Stressing he argued that in case this court will not grant this application, the applicant as an administrator of the estate and the beneficiaries will suffer loss.

In conclusion, he maintained his prayer, he urged this court to grant the application with costs.

I have considered the applicant's counsel and the 1st, 2nd, 3rd, 4th, and 8th respondents' counsels' oral submission as well as the applicant's affidavit and respondents' counter affidavits. For the reasons which will be apparent herein, I think that I need not dwell much in addressing the applicant's application. In resolving the issue, the question is *whether the applicant has satisfied the Court that the facts and circumstances of its case bring this application within the ambit of one or more of principles for which stay of execution may be granted.*

It is trite law that stay of execution is grantable on the applicant's demonstration that his application falls within any or all of the principles that govern such grant. These principles are as articulated in the cases of **Hatibu** (supra) and **Ignazio Messina & National Shipping Agencies v Willow Investment & Costa Shinganya**, the Court of Appeal of Tanzania, Civil Reference No. 8 of 1999 (unreported), the Court of Appeal of Tanzania held that:-

"It is now settled that (i) The Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage; (ii) It is equally settled that the Court will order a stay if

refusal to do so would, in the event the intended appeal succeeds, render that success nugatory; (iii) Again the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so."

Equally, Order XXXIX Rule 5 (3) of the Civil Procedure Code Cap.33 [R.E 2019] provides that:-

" 5 (3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the High Court or the court making it is satisfied-
(a) that substantial loss may result in the party applying for a stay of execution unless the order is made;
(b) that the application has been made without unreasonable delay;
and
(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."

Applying the above provision of law in the instant application. Regarding the first principle; substantial loss. The applicant's quest for a stay of execution is predicated on the averments made in paragraphs 14 and 15 of the supporting affidavit. Key among them is the fact that there is a pending Application for Execution No. 32 of 2020 related to the plots located in Bagamoyo and the same are going to be executed and that the applicant will stand to suffer an irreparable loss as the respondents do not

have the means to refund the sum that may be paid out to them. This has been amplified in the submission made by Mr. Mapembe, learned counsel in support of the application. The argument is that in case this court will not grant the application, the applicant will suffer loss as an administrator of the estate of his late father, his beneficiary will suffer loss. This contention has been seriously challenged by the respondents. He contended that the applicant will not suffer loss because the suit Plots No. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 are located in Sanzale Bagamoyo District, not Magomeni Bagamoyo District.

I am convinced that the arguments raised by the respondents Advocates are formidable enough to form the basis for refusing this application. I take the view that the applicant has demonstrated that this application has what it takes to succeed. However, the applicant did not mention the plots number in the affidavit and where the Plots are situated in a different place and he was not even sure whether the said Plots were subjected to eviction. I am saying so because the applicant said that he informed by the 6th respondent that the Pots located at Magomeni area Bagamoyo District are subject to eviction, while the said plots are quite different from the ones listed or mentioned in the Execution Order. The 1st to 5th respondents have proved their ownership by attaching a certificate

of occupancy, sketch map, payments receipts, and other documents to prove their ownership. While the applicant has not shown sufficiently that he stands to suffer a substantial irreparable loss if the application is refused, and that success in the intended pending application will be rendered nugatory if the execution of the order of this court is left to proceed.

In my considered view, the applicant's grounds do not fit squarely in the principles enunciated in **Hatibu** (supra) and **Ignazio Messina & National Shipping Agencies** (supra).

Concerning security, as rightly pointed out by Mr. Mazulla that the conditions stated under the above Order must be cumulatively complied with by the applicant for the court to grant the order for stay of execution. In the case of **FINCA Tanzania v Leonard Andrew Karogo** (supra) my brother Hon. Kisanya, J dismissed the application for stay of execution after noting that the applicant has failed to furnish security for the due performance of the decree. The Court of Appeal of Tanzania in the case of **Felix Emmanuel Mkongwa** (supra) stated that:-

" The above provisions, we think are self- explanatory and need no further expounding. Suffice only to state that, for an application for stay of execution to be granted under the Rules, the above conditions had to be cumulatively complied with, meaning that in case one of them could

have been dissatisfied, the court would decline to grant the order for stay of execution. The duty of the applicant to satisfy all the conditions cumulatively has been constantly reiterated by this court in its several decisions."

The same situation applies in this instant application, the applicant stated that the applicant will incur a loss if the instant application will not be granted. However, he failed to comply with the requirement of Order XXXIX Rule 5 (3), (c) of the Civil Procedure Code Cap.33 which requires the applicant to show if there was an agreement or equivocal declaration of intention to furnish security for the performance of decree. The same was not even attached to the application.

I understand that in the strict sense of it, it does not necessarily mean that a party has to give such security. The same was observed in the case of **Tanzania Petroleum Development Corporation** (supra). I expected the applicant at least could have mentioned in his affidavit that they are making an undertaking for the demanding security for performance. But that was not the case, the applicant has not covered that aspect in both the affidavit and chamber summons.

From the above analysis, there is no doubt that the application is not meritorious for failure to furnish security for the due performance of the

decree as may ultimately be binding on him as required by the Order XXXIX Rule 5 (3) (b) and (c) of the Civil Procedure Code Cap.33 [R.E 2019].

In view thereof, I dismiss the applicant's application for stay of execution without costs.

Order accordingly.

Dated at Dar es Salaam this 10th August, 2021.




A.Z.MGEYEKWA

JUDGE

10.08.2021

Ruling delivered in the presence of Mr. Mapembe, learned counsel for the applicant and Mr. Shipande, learned counsel for the 1st, 2nd, 3rd and 4th Respondents and Mr. Makatta, learned counsel for the 8th respondent.




A.Z.MGEYEKWA

JUDGE

10.08.2021